VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Ch. 151

Re:	*Central Vermont Public Service Corp. and Verizon New England (Guilford)*	Land Use Permit Amendment Application #2W1154-1-EB

MEMORANDUM OF DECISION ON MOTIONS TO ALTER

The Agency of Commerce and Community Development (ACCD), Central Vermont Public Service Corporation (CVPS) and Department of Public Service (DPS) move to alter the Board's Findings of Fact, Conclusions of Law, and Order issued September 2, 2003 (Decision). As discussed below, the Environmental Board (Board) grants CVPS's motion in part, denies it in part, and denies the motions of ACCD and DPS.

I. Procedural History

On September 10, 2002, CVPS and Verizon New England (Applicants) filed land use permit application #2W1154 with the District 2 Environmental Commission (Commission) for the construction of approximately 3,700 feet of utility line along Melendy Hill Drive in the town of Guilford, Vermont (Project). While that permit application was being processed, adjoining landowners William Lax and Sydney Crystal filed a request for an interim permit for a line extension of one pole to serve their property. The Commission bifurcated the application and issued an initial permit #2W1154 (Initial Permit), for the line extension serving the Lax/Crystal property. The Initial Permit and accompanying decision (Initial Decision) made clear that the Commission would include any impacts from this portion of the project, as well as address conformance with applicable local and regional plans, in its final decision on the entire project.

On December 20, 2002, the Commission issued its Findings of Fact, Conclusions of Law, and Order (Commission Decision) denying application #2W1154-1 for the Project.

On January 3, 2003, CVPS filed an appeal from the Commission Decision, alleging that the Commission erred in its conclusions concerning 10 V.S.A. § 6086(a)(6), (7), (9)(A), (9)(H) and (10)(Criteria 6, 7, 9(A), 9(H), and 10).

On January 28, 2003, the Board Chair convened a prehearing conference with the following participants: CVPS, by Timothy Upton; Verizon New England, by Jean Kingston, Esq.; Agency of Natural Resources (ANR), by Warren T. Coleman, Esq.; Guilford Planning Commission, by Rick Zamore. Prior to the prehearing conference, adjoining property owners William Lax and Sydney Crystal, and the Windham Regional Commission, notified the Board of their intent to participate as parties in this proceeding.

On January 30, 2003, the Chair issued a Prehearing Conference Report and Order (PCRO). Among other things, the PCRO identified issues and parties.

On February 3, 2003, CVPS filed objections to the PCRO. On February 18, 2003, the Town of Guilford filed a response to CVPS's objections to the PCRO. The Board deliberated on February 19, 2003.

On February 24, 2003, the Board issued a Memorandum of Decision on CVPS's objections to the PCRO. A Revised Memorandum of Decision was issued on February 28, 2003, adding the dissenting opinion of one Board member. Also on February 28, 2003, CVPS filed a Motion to Alter the Memorandum of Decision. The Board deliberated on March 19, 2003. On March 26, 2003 the Board issued a Memorandum of Decision denying the Motion to Alter.

On May 14, 2003, the Board convened a public hearing in this matter, Chair Patricia Moulton Powden presiding. The Board conducted a site visit, admitted exhibits and heard testimony. The Board commenced deliberations immediately after the hearing and also deliberated on May 21, 2003.

On June 3, 2003, the Board issued a Hearing Recess Order requesting additional evidence and setting a reconvened hearing for July 2, 2003. ACCD entered an appearance through its General Counsel, John Kessler, Esq., and DPS entered an appearance through its Deputy Commissioner, John Sayles, Esq.

On July 2, 2003, the Board reconvened the hearing, admitted exhibits and heard testimony. The Board deliberated immediately after the hearing and also on August 6 and August 27, 2003. Based upon a thorough review of the record, related argument, and the parties' proposed findings of fact and conclusions of law, the Board declared the record complete and adjourned.

On September 2, 2003, the Board issued its Findings of Fact, Conclusions of Law, and Order approving Land Use Permit Application #2W1154-1-EB. CVPS filed a Motion to Alter on September 30, 2003 and ACCD and DPS filed Motions to Alter on October 2, 2003. The Windham Regional Commission filed its opposition to the Motions to Alter on October 26, 2003. The Board deliberated on November 12, 2003.

II. Discussion

ACCD, CVPS and DPS have filed separate motions to alter the Decision. In general, the moving parties do not object to the Board's issuance of a permit, but are critical of the Board's reference to EBR 34(A) as it applies to utility projects. The moving parties also argue that the Board and district commission should not consider secondary impacts of utility projects, particularly where those impacts are residential homes, even though no such impacts were found in this case. They also raise several broad policy questions that go beyond the scope of these appeals. In

addition, CVPS requests that certain extraneous findings and conclusions be deleted. The Windham Regional Commission opposes the motions.

The Board addresses each motion in turn.

A. CVPS's Motion to Alter

CVPS does not object to the Board's decision to grant this permit application, but asks that certain changes be made in that Decision. The central arguments in CVPS's motion are that no permit amendment should be required for any substantial or material change to a permitted utility project, and that the Board and district commissions should not review secondary growth impacts of utility lines over which the utility has little or no control. CVPS also asks the Board to delete certain extraneous findings and conclusions, and to alter the Decision with respect to certain issues raised under Criterion 10.

1. Amendment Jurisdiction

CVPS argues that the portion of the Board's decision noting the applicability of EBR 34(A) creates a "sea change in Act 250 jurisdiction." (CVPS Motion, at 8-9.) To the contrary, the Decision does not change the way Act 250 jurisdiction applies to utility projects. It simply cites current law. A permit amendment is required for any material or substantial change to a permitted utility project. EBR 34(A).

This appeal does not present the Board with the question of whether amendment jurisdiction should attach to any particular project. The Board could consider such a question only in a Declaratory Ruling request brought pursuant to 10 V.S.A. § 6007(c). *See, The Stratton Corporation*, #2W0519-17(Revised)-EB, Dismissal Order, at 4-5 (Jan. 15, 2001)(Board lacks subject-matter jurisdiction to consider Act 250 jurisdictional issue not ruled upon by a district coordinator). The Board addresses CVPS's arguments only in terms of whether the challenged citation to EBR 34(A) is accurate.

CVPS argues that utility line extensions should not be subject to EBR 34(A) for several reasons. Its first argument is that EBR 2(A)(1)(m) defines development to include certain line extensions, and that line extensions should come under Act 250 jurisdiction only when they constitute development under that definition. The definition of development applies to determine whether an Act 250 permit is required in the first place, not whether a permit amendment is required. Act 250 requires, in relevant part, that a permit be obtained for any "development." 10 V.S.A. § 6081(b); *see also, id.* § 6001(3)(defining development); EBR 2(A)(defining development). Once a permit is obtained, however, a permit <u>amendment</u> is required for any substantial or material change to the "permitted project." EBR 34(A). Not every line extension is off a permitted project. EBR 2(A)(1)(m) describes when a line

extension that is not off a permitted project will trigger original Act 250 jurisdiction. The inclusion of line extensions in the definition of development does not exempt them from Rule 34(A).

As CVPS notes, there are special definitions of "development" applicable to electrical distribution or communication lines and related facilities. *See,* EBR 2(A)(1)(m). However, none of these provisions exempts utility projects from amendment jurisdiction under EBR 34(A). In fact, one of these rules provides that a "substantial change" shall be "as defined in Rule 2(G) and shall include . . . the addition above the ground of more than ten feet in height to a pole, including the length of any apparatus attached to the pole to the extent such apparatus extends vertically above the pole." EBR 2(A)(1)(m)(i)(c). As discussed below, substantial change to a permitted project is one of the triggers for amendment jurisdiction. The rules clearly contemplate amendment jurisdiction over utility line projects.

Next, CVPS cites the definition of involved land at EBR 2(F)(3) in support of its argument that EBR 34(A) should not apply to utility projects. Like the definition of development, however, the definition of involved land goes to original, not amendment jurisdiction. The land governed by a land use permit need not remain limited to that land involved in the original permit. A permittee may expand onto new property and that expansion may constitute a substantial and material change. The definition of involved land cited by CVPS does not indicate that EBR 34(A) should not apply to utility projects.

CVPS also argues that *Re: CVPS*, #7C0734-EB, Memorandum of Decision (Aug. 6, 1991) indicates that line extensions off permitted projects do not require permit amendments. In that case the Board noted that the district commission could put a condition in a utility's permit to require a permit amendment for any future extension. *Id.* at 2. This does not mean that EBR 34(A) does not apply to extensions that are substantial or material changes, it merely notes that a district commission has the authority to go beyond that and require an amendment application for every extension where needed for compliance with Act 250. This case does not support CVPS's argument.

CVPS also makes several assertions regarding the administrative and policy aspects of amendment jurisdiction and utility projects, to support its argument that EBR 34(A) should not apply. EBR 31(A), which governs Motions to Alter, provides in relevant part that: "New evidence may not be submitted unless the board or district commission, acting on a motion to alter, determines that it will accept new evidence." Because the jurisdictional issue CVPS seeks to resolve is not and cannot be presented in this appeal, the Board declines to reopen the hearing to take new evidence.

In its motion, CVPS contends that: "Act 250 was never intended to latch on to a group of poles and follow the expansion and reconstruction of the grid as it grows and moves over time, creating an ever-expanding web of jurisdiction." (CVPS Motion, at 14-15.) Act 250 was intended "to protect and conserve the environment of the state and to insure that these lands and environment are devoted to uses which are not detrimental to the public welfare and interests." Findings and Declaration of Intent, 1969, No. 250 (adj. Sess.), § 1, eff. April 4, 1970; *see also, In re Agency of Transportation*, 157 Vt. 203, 208 (1991)(Act 250 is broad legislation designed to preserve the state's environment)(citing *In re Hawk Mountain Corp.,* 149 Vt. 179, 184, 542 A.2d 261, 264 (1988)). To allow a permitted project to change in a way that could have significant impact under Act 250, without further Act 250 review, would negate the purpose of Act 250.

CVPS acknowledges that Rule 34(A) applies to changes in design during or after construction of a permitted utility project. Under the current regulatory framework, it is not clear how other subsequent substantial or material changes to these types of projects could be treated any differently. The law currently requires permit amendments for substantial or material changes to permitted utility projects. The Board has no authority to issue a decision exempting CVPS from this requirement in the context of this appeal. This portion of CVPS's Motion to Alter must therefore be denied.

2. Secondary Impacts

CVPS makes several arguments concerning how secondary impacts of utility projects should be reviewed. In this case, however, the Board found no significant secondary impacts. As a result, many of the arguments and broad policy questions raised by CVPS concern preexisting case law,[1] not this appeal.

CVPS argues that the fiscal criteria should not require review of impacts from "non-jurisdictional" development, such as residential homes not regulated by Act 250. Under the fiscal criteria, the question is not whether there is jurisdiction over any secondary development, but whether and to what extent such impacts exist. Whether there is jurisdiction over secondary development is irrelevant. In any event, the Board found no such impacts in this case.

CVPS also contends that utility projects that facilitate the development of higher-value homes would be more likely to get Act 250 approval than utility projects

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[1] *See, e.g., Re: Washington Electric Cooperative, Inc.*, #5W1036-EB, Findings of Fact, Conclusions of Law and Order at 8-10 (Dec. 19, 1990)(utility project application denied because utility applicant failed to provide a reasonable study of growth impacts). The Board did not require such a study in this appeal.

that facilitate lower-value homes, due to the impact on the municipal tax base. Despite CVPS's argument, on page 3 of its Motion, the Decision does not indicate that the Board has adopted a policy concerning housing of any type. Certainly a utility project's secondary contribution to the tax base is a legitimate consideration under the fiscal criteria, but it is only one factor of many. *See, e.g., Re: St. Albans Group and Wal*Mart Stores, Inc.*, #6F0471-EB, Findings of Fact, Conclusions of Law, and Order (Altered) (June 27, 1995); *aff'd, In re St. Albans Group and Wal*Mart Stores, Inc.,* 167 Vt. 75 (1997). In this case, however, the Board has ruled that the homes served in this case were not facilitated by the Project. The Board cannot address CVPS's argument on the facts of this case.

CVPS also raises questions about Act 250 review of service connections in the future. Again, answers to such specific questions will depend on the facts of the given case, and those facts are not presented in this appeal. To clarify, however, the Board and district commissions are not authorized to grant or deny electric or telephone service, and cannot mandate the redesign of homes or other development over which there is no Act 250 jurisdiction. The Board and district commissions are authorized only to apply Act 250, which necessarily entails examination of secondary growth impacts.

Contrary to CVPS's assertion (on Page 20), reviewing secondary impacts of utility line projects subject to Act 250 does not constitute "the 'back-door' imposition of zoning." It is part of the application of Act 250. Generally speaking, if a proposed utility line extension would lead to significant development in an environmentally sensitive area, that would need to be considered in reviewing the utility's permit application. The Decision noted that Guilford has not adopted zoning, and that the town and regional plans were less than clear in any attempt to limit development in the Melendy Hill Drive area. However, the Board is required to examine proposed developments for secondary growth impacts and it properly did so in this case. No such impacts were found.

The Decision does not extend the law on secondary impacts. To the contrary, the Board concluded that no significant growth would be facilitated by the Project. Apart from the findings and conclusions discussed below, there is no reason to alter the secondary growth discussion in the Decision.

3. Request to Delete Findings and Conclusions

In its Motion to Alter, CVPS requests that the Board delete certain findings and conclusions. (Motion at 5-6.) Specifically, CVPS requests that the Board delete Findings 9, 16, 19, and the last sentence of Finding #23, and certain conclusions concerning school enrollment and capacity and the assessed value of homes using the line. Since the Board concluded that the homes served by the Project would

have been built regardless of the availability of utility service, this request can be granted. An altered decision shall be issued without these findings and conclusions.

4. Criterion 10

a. Transmission vs. Distribution

CVPS contends that the Board's conclusion that the Project is a transmission line for purposes of applying the Windham Regional Plan under Criterion 10, contradicts its earlier decision in *Mill Lane*. *Re: Mill Lane Development Co., Inc.*, #2W0942-2-EB, Findings of Fact, Conclusions of Law, and Order (Dec. 17, 1999). In *Mill Lane*, the Board held that:

> The Project complies with the fourth Resource Land policy that specifies avoidance of extension of roads, energy transmission facilities, and other services into and through Resource Lands. By improving Old Mill Lane, a previously existing woods road, the Project avoids extension of a new road into and through Resource Lands. Power lines will be extended through the Project Tract, but they will be underground.

Mill Lane, Findings, Conclusions and Order at 37. In *Mill Lane*, the Board held that the lines did not violate the fourth Resource Land policy because they were buried, not because they were "distribution" lines rather than "transmission" lines. In this case, the utility lines are not buried. *Mill Lane* does not contradict the Decision.

In the Decision the Board acknowledged that, in technical terms, electrical distribution is not electrical transmission. However, the Board concluded that the intent of the regional plan was to use the plain meaning rather than the technical meaning in this instance. The facts that EBR 2(T) and 30 V.S.A. § 248(a)(2)(A) distinguish between distribution and transmission does not mean that the regional plan intended to make the same distinction.

b. Conflict Between Municipal and Regional Plans

CVPS claims it did not raise the argument that the town and regional plan are in conflict and asks the Board to delete this section of the Decision. However, in its proposed findings and conclusions CVPS stated that, even if the Project did not comply with the regional plan, it would comply with Criterion 10 because it will not have a substantial regional impact. (CVPS Proposed Findings of Fact and Conclusions of Law at 31.) In support of this position, CVPS cited 24 V.S.A. § 4348(h), which provides in relevant part that a regional plan which conflicts with the town plan will only be given effect if a substantial regional impact is demonstrated. CVPS then pointed out that the Commission denied on the regional plan without

finding a substantial regional impact, despite finding compliance with the town plan, and argued that: "Conformance with the municipal plan and non-conformance with the regional plan is the very definition of conflict between the two plans." (CVPS Proposed Findings and Conclusions at 31.) This issue was properly addressed in the Decision.

B. ACCD's Motion to Alter

Like CVPS, ACCD objects to the Decision's references to amendment jurisdiction under EBR 34(A) and to the law on secondary impacts.

1. Amendment Jurisdiction

ACCD argues that application of EBR 34(A) "casts the broadest possible jurisdictional net." (ACCD Motion at 4.) As set forth above, the Decision did nothing to change the law of amendment jurisdiction or its applicability to utility projects. The scope of Act 250 jurisdiction is no broader now than it was before the Board issued this Decision.

ACCD argues that EBR 2(A)(1)(m)(i)(e) limits Act 250 jurisdiction over utility projects to construction that is reasonably identifiable at the time the project is commenced. This is correct in terms of original Act 250 jurisdiction, i.e., whether a utility project needs a permit in the first instance, as discussed above. Once a permit has been issued, however, Rule 34(A) and the rules defining substantial change and material change apply to determine whether an amendment is required. *See*, *e.g.,* EBR 2(G)(defining substantial change); EBR 2(P)(defining material change).

In Part II of its Motion, ACCD claims that the Board's conclusion concerning EBR 34(A) is unsupported by findings of fact. Specifically, ACCD argues that there is no evidence that the Project would facilitate significant growth, so there is no support in the record for the conclusion that EBR 34(A) applies. The Board did conclude that this Project would not facilitate significant growth. However, this does not mean that the Project should be exempted from EBR 34(A).

2. Secondary Impacts

ACCD requests clarification of the first footnote in the Board's decision, which states in part that Act 250 will not review the future customer's home, but "the Act 250 impacts of residences and any other development that will be attracted to an area because of the utility project must be considered in reviewing the utility's application for a land use permit." (Decision at 15 n.1.) Specifically, ACCD asks whether this is limited to residences and other development that are reasonably identifiable at the time of the original permit. The limitation to construction that is reasonably identifiable at the time the project is commenced comes from EBR

2(A)(1)(m)(i)(e), which concerns how to determine how much land is involved in a utility project that is to be completed in stages, for purposes of determining whether there is original jurisdiction over a project. EBR 2(A)(1)(m)(i)(e) does not apply to determine what constitutes a secondary impact of a utility project.

ACCD also asks for clarification on how a utility can determine whether any future development is facilitated by or attracted to an area by the utility project. In this case, the project did not facilitate significant development. In other cases, such as those cited in the Decision, the Board has found that a utility project would facilitate development. The Board is guided by its precedent and the facts of the case in making this determination.

ACCD objects to the Board's reference to impact fees as a remedy under the fiscal criteria. No such fees were imposed in this case, and the citation of Board precedent in the Decision does not signal anything new. ACCD is also critical of the Board's review of the Project for secondary growth impacts under Criterion 9(A) and 9(H). (ACCD Motion at 7-9.) As discussed in the Decision, however, examination of growth impacts is required by the statute. The Board does not have discretion not to apply Act 250.

ACCD argues that examination of secondary growth impacts will inappropriately favor larger, more expensive homes with no children over smaller, less expensive homes with children. As stated elsewhere herein, the Board concluded that this Project will have no significant growth impacts. ACCD's policy argument goes beyond the scope of this appeal.

ACCD also claims that the finding that the "availability of electric utility service may encourage or facilitate additional development, but is not the sole factor or cause of such development," which appears in the Decision as Finding 16, is unsupported by the record. CVPS had proposed a broad finding that "Electric utility lines do not enable growth that would otherwise be impossible." After hearing the evidence, however, the Board issued the finding challenged by ACCD. This finding is based on the credible evidence heard by the Board and the Board declines to alter this finding.

Ultimately, ACCD asks the Board to delete any reference to amendment jurisdiction and growth impacts that involve residences. The Board declines to do so for the reasons stated herein.

C. DPS's Motion to Alter

Like ACCD and CVPS, DPS asks the Board to hold that EBR 34 does not apply to utility projects, and objects to any reference to review of secondary growth impacts in the Decision.

1. Amendment Jurisdiction

DPS asks the Board "to find that the policy of requiring review of utility line extensions . . . under EBR-34 . . . is an improper application of the Board's authority." Like the other moving parties, however, DPS points to nothing that exempts electric utilities from EBR 34(A). And, as discussed above, this case does not concern whether amendment jurisdiction should attach to any particular project. This is an appeal on certain Act 250 criteria and challenging certain conditions of the Commission Permit.

Contrary to the assertion on page 1 of DPS's motion, the Decision does not "create" any new obligation to seek a permit amendment under EBR 34. The Decision simply states the current rule. Nor does the Decision require utilities to provide notice to potential customers for each subsequent line extension. EBR 34(A) requires a permit amendment only for substantial or material changes to the permitted project. It is up to utility permittees whether and how to inform potential customers of applicable permitting requirements.

In its motion, DPS argues that the decision will impose additional recordkeeping and notification costs and that these will have to be borne entirely by requesting customers. According to DPS, the utility cannot spread such costs among ratepayers without showing a general benefit to the ratepaying public. As stated above, the Board declines to reopen the hearing in this matter to take new evidence on administrative burdens. The Decision imposes no notification requirement, and no new recordkeeping requirement. In the Board's opinion, any utility's compliance with Act 250 does provide a general public benefit.

DPS acknowledges that it is "appropriate that local town or state policymakers are concerned about growth that may stem from a utility plant extension," but argues that the town should not transfer planning responsibility to the utility companies and ratepayers. (DPS Motion at 1.) The Board notes now, as it did in the Decision, that local planning and zoning could have provided clearer guidance in this case. However, the Act 250 permit application was granted because no provision of the town or regional plan was violated and because the Project will cause no significant secondary growth. Regardless of the strength and specificity of local planning and/or zoning, which factor into review under Criterion 10, the Board and commissions must examine any secondary impacts under other criteria.

DPS also argues that secondary growth impacts from utility projects cannot be addressed effectively through individual permits that apply only to utility lines or extensions over 2,200 feet in length, and that this will result in a jurisdictional "hodge-podge." As noted in the Decision, Act 250 is not designed to address the

effects of incremental growth. It was intended to be used in conjunction with state, regional and local land use planning and zoning, which are better suited to that task.

Moreover, Act 250 was intended to guard against the environmental impacts of large-scale development. The statute and rules establish certain "bright-line" tests for jurisdiction which, like any other jurisdictional threshold, may appear arbitrary in isolation, and which result in Act 250 jurisdiction extending to some projects but not others. Once a project gets an Act 250 permit, that permit runs with the land and its conditions apply to the project tract regardless of who may own it in the future. A substantial or material change to a permitted project, by definition, is one that may cause environmental impacts under Act 250. *See*, EBR 2(G); EBR 2(P). Whether a permitted project is a utility line or some other commercial, industrial or residential development, substantial or material changes cannot be made without a permit amendment under current law. EBR 34(A). This is consistent with the purpose of Act 250.

IV. ORDER

1. CVPS's Motion to Alter is GRANTED in part and DENIED in part. Altered Findings of Fact, Conclusions of Law and Order are issued herewith.

2. ACCD's Motion to Alter is DENIED.

3. DPS's Motion to Alter is DENIED.

4. This matter is REMANDED to the District 2 Environmental Commission for issuance of Land Use Permit Amendment #2W1154-1-EB, consistent with this decision.

DATED at Montpelier, Vermont this 19th day of December, 2003.

ENVIRONMENTAL BOARD

_/s/Patricia Moulton Powden__
Patricia Moulton Powden, Chair
George Holland*
Samuel Lloyd
Donald Marsh
Patricia Nowak*
Alice Olenick
Jean Richardson

***** Board Member George Holland CONCURS in part and DISSENTS in part, and is joined by Board Member Patricia Nowak:

I concur with the majority in granting CVPS's motion in part and deleting unnecessary findings and conclusions. These findings and conclusions concern what might, in another case, be considered secondary impacts. While I agree with the majority that no such impacts were found here, I continue to dissent from any mention of Board precedent that would indicate that it is appropriate to include unregulated residential development in the Act 250 permitting process for utility line extensions.

Also, I am persuaded by the moving parties that the special definitions of development and involved land for utility projects should be read to exempt utilities from amendment jurisdiction under EBR 34. Given the majority's decision that EBR 34 applies to utilities, I continue to hope that changes will be made to exempt utilities like CVPS from this requirement.

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